

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman and Commissioners Downey, Knox and Swanson

From: Jill Stecher, Commission Counsel
Luisa Menchaca, General Counsel
John Wallace, Assistant General Counsel

Re: Pre-notice Discussion of Regulation 18329.5 – Commission Advice
Procedure - Government Code Sections 87300-87306

Date: November 22, 2002

I. INTRODUCTION

At the November 5, 2001 meeting, the Commission approved as one of its objectives for 2002 a review of the Commission's role in the preparation and review of conflict of interest codes and timely filing of statements of economic interests by public officials and designated employees. In April of 2002, staff identified several projects to implement the Commission's goals and objectives. Staff then convened an internal task force comprised of personnel from each division that has met regularly to research and to prepare proposals for Commission review in connection with the projects.

Staff combined projects A.2: Commission Role – Local Government Agencies, and project A.7: Commission Role – Section 87200, due to overlapping issues applicable to both state and local governmental agencies.

Project A.2

Project A.2 entails clarifying when an individual who works for a local agency, an agency or a code reviewing body may seek Commission advice and/or assistance regarding conflict of interest codes and obligations under the provisions of Government Code section 87302. Proposed regulation 18329.5 is considered an addendum to regulation 18329, which gives the guidelines for formal written advice and informal assistance. However, the proposed regulation sets forth the advice procedures only for Government Code sections 87300 to 87306.

Project A.7

When section 87200 was amended to add "other public officials who manage public investments," the Commission considered what types of public officials would qualify under this new category. The Commission then defined which officials were

covered by this new provision in regulation 18701(b). These public officials are not required to file statements of economic interests under their agencies' codes and are subject to the extensive disclosure requirements for 87200 statutory filers.

Project A.7 entails clarifying what procedures should be followed when an individual who works for a local agency, an agency or a code reviewing body seeks advice or a determination regarding whether a public official is one who manages public investments. This advice procedure is also set forth in proposed regulation 18329.5.

Interested Persons' Meeting

The internal task force reviewed and made suggestions for this proposed regulation, which was presented in draft form at an interested persons' meeting on November 14, 2002. The general consensus among the attendees was that the code reviewing body should know that an individual or an agency has contacted the Commission for advice or assistance. It was generally acknowledged that the code reviewing body should not be omitted from the advice procedure and should not learn of Commission advice after the fact.

The attendees also acknowledged that a structured advice procedure would serve two functions: (1) it would bar the Commission from being in the middle of an individual and/or an agency and the code reviewing body, and (2) it would not impede the role or authority of the code reviewing body. Therefore, they suggested that the proposed regulation state that an individual or agency must notify the appropriate code reviewing body prior to making a request for advice or assistance. The attendees agreed in concept with the proposed regulation.

II. OVERVIEW OF THE LAW

The Political Reform Act (the "Act")¹ requires that certain public officials disclose personal financial holdings which may be affected by their official duties. It does so by adoption of agency conflict of interest codes and mandatory filing of individual statements of economic interests (SEIs). Section 87300 requires that every agency adopt a conflict of interest code and section 87301 sets forth the policy that codes be formulated at the most decentralized level possible.

In 1980, the Commission adopted a "model" conflict of interest code that contains all of the provisions specified in section 87302. (Regulation 18730.) Most state and local agencies simply incorporate the regulation as the body of their conflict of interest code and attach a list of designated employees and their assigned disclosure categories.

Regulation 18730(b)(11), which states that a designated employee who is unsure of his or her duties under the code may request assistance from the Commission or from

¹ Government Code sections 81000-91014. Commission regulations appear at Title 2, sections 18109-18997 of the California Code of Regulations.

the attorney for his or her agency, is part of the model code. Proposed regulation 18329.5 addresses the advice procedure as it pertains to this subdivision.

Section 87312 requires the Commission, upon request, to provide technical assistance to agencies in the preparation of their conflict of interest codes. The Technical Assistance Division provides training workshops and telephone and written assistance to state and local agencies in the process of adopting and amending conflict of interest codes.

The Legal Division responds to requests for written advice from individuals and agencies on a case-by-case factual basis. The Commission is empowered to provide assistance to agencies and public officials in administering the provisions of the Act. (Section 83113(c).) Section 83114(b) enables a person to request that the Commission provide written advice with respect to his or her duties under the Act. Regulation 18329 provides the guidelines for the Commission to assist persons in compliance with the Act and to provide or deny formal written advice and informal assistance.

Proposed regulation 18329.5 deals specifically with advice procedures for sections 87300 to 87306, pertaining to conflict of interest codes. The purpose of the proposed regulation is to balance the Commission's role of providing advice and assistance with the decentralization policy regarding the formation of conflict of interest codes, and with the statutory authority given to the code reviewing body to revise and adopt conflict of interest codes.

III. PROVISIONS OF PROPOSED REGULATION 18329.5

The proposed regulation is divided into four subdivisions. The first three subdivisions address the guidelines and procedures for rendering advice. The last subdivision addresses what information the Commission may need to render advice.

Subdivision (a)

Subdivision (a) provides guidelines for advice or assistance to an agency, code reviewing body or its authorized representative regarding the provisions of Government Code section 87302. The hierarchical structure defers to the statutory authority of the code reviewing body to revise and approve codes, since a code is not effective until it is approved by the code reviewing body. (Section 87303.) The proposed regulation sets forth that the Commission will render advice or assistance to:

- (1) a code reviewing body;
- (2) an agency and its code reviewing body that jointly submit a written request;
- (3) any agency for which the Commission is the code reviewing body;

- (4) an agency, that notifies its code reviewing body prior to making a request and submits its request prior to submission of its conflict of interest code to the code reviewing body for adoption or amendment. The request is limited to informal assistance, which will be declined without both the prior notification and code submission (this is an option shown in brackets), and
- (5) the authorized representative of any of the above.

Decision 1 (subdivision (a)(4)):

Subdivision (a)(4) has a critical distinction and is purposely in contrast to subdivisions (a)(1) through (3), where the Commission will render formal advice, if requested.

The underlying premise in subdivision (a)(4) is that the Commission will only provide informal assistance to an agency so it does not usurp the authority of the code reviewing body. If the Commission issued formal advice, it would give immunity to the requestor and bind the code reviewing body. Under the statutory authority, the code reviewing body should be able to make a final determination regarding amendment or adoption of a code.

The attendees at the interested persons' meeting strongly suggested that the code reviewing body should not be omitted from the advice procedure and should not learn of Commission advice after the fact. Therefore, we added the requirement that the Commission will issue informal assistance to an agency only if it both notifies the code reviewing body of its request and submits its request prior to submission of its conflict of interest code to the code reviewing body for adoption or amendment.

Staff recommends including this language in subdivision (a)(4), for the reasons stated above.

Subdivision (b)

Subdivision (b) provides guidelines for advice or assistance to individuals. The proposed regulation seeks to strike a balance in the Commission's duty to provide advice and assistance that must be balanced with the "decentralization" policy of section 87301 and the statutory authority of the code reviewing body. Therefore, it is not the Commission's function to make a determination that would impact the formulation or amendment of an agency's conflict of interest code, unless the Commission is the code reviewing body.

The proposed regulation clarifies the advice procedure when an individual has a question that may impact his or her obligations under a conflict of interest code pursuant to Government Code section 87302. Notwithstanding regulation 18730(b)(11), the

Commission will provide advice or assistance pursuant to the procedures set forth in this proposed regulation.

If an individual poses a dual question regarding his or her agency's determination as to obligations in the conflict of interest code as well as interpretation of sections 87100 and 87103 (disqualification) or section 18701 (public official), for example, this becomes problematic. Our response to such dual questions could result in a challenge to a local agency's determination and therefore impacts the code process.

Therefore, advice or assistance for dual questions will be rendered to an individual only when a joint written request is submitted with his or her agency or its authorized representative, subject to the provisions in subdivision (b)(2).

Subdivision (b)(1)

The subdivision provides that the Commission will render advice or assistance directly to an individual when the request pertains to a designated employee's reporting requirements or to a specific determination as to whether the individual is a "public official" or subject to the disqualification or gift limit provisions.

Subdivision (b)(2)

The language in subdivision (b)(2) provides that an individual may only request advice or assistance as to his or her agency's determination that he or she has obligations in a conflict of interest code by jointly submitting a written request with his or her agency or its authorized representative. The individual or agency must notify the appropriate code reviewing body prior to making a request and must submit the request prior to submission of the conflict of interest code to the code reviewing body for adoption or amendment, or the request will be declined.

The request is limited to informal assistance, unless an individual, agency and the appropriate code reviewing body or their authorized representative submit a joint written request.

The requirement for prior notification and prior to code submission is consistent with the language in subdivision (a)(4), above, the subject of Decision 1. Staff also recommends including this language in subdivision (b)(2), for the same reasons as stated above.

Subdivision (c)

Subdivision (c) addresses Section 87200 filers and specifically, "other public officials who manage public investments." After section 87200 was amended to add this category of officials, the Commission defined which officials were covered by this new provision in regulation 18701(b). A statutory "87200 filer" has broader reporting

requirements under the statute and his or her filing obligation is triggered by the statute, not by an agency's code.

Under the proposed regulation, the Commission will render advice or assistance directly to a public official concerning whether he or she is subject to Government Code section 87200 and is in fact a "87200 filer."

If the Commission concludes under regulation 18701(b) that an individual is not a "public official who manages public investments," it is not a determination that an individual must file a disclosure statement pursuant to a conflict of interest code. The agency or code reviewing body must make that determination.

Subdivision (d)

Since the Commission provides formal written advice on a case-by-case factual basis, subdivision (d) specifies what information a requestor may need to provide. In order to render advice or assistance, examination of pertinent agency determinations regarding an individual's obligations under the Act, the individual's employment contract, duty statement and the agency's conflict of interest code may be requested.

Comment

The comment summarizes the statutory remedies for an individual potentially subject to a conflict of interest code. Initially, an individual may petition his or her agency to amend its code. An individual may appeal a denied petition to the code reviewing body and may also seek judicial review of an action taken by the code reviewing body.

These remedies may also be sought by the Commission, an agency, an officer, employee, member or consultant of an agency, or by a resident of the jurisdiction. Since there are statutory remedies in place, it is not necessary to include other remedies in the proposed regulation.

Staff Recommendation

Staff recommends that the Commission notice the proposed regulation, with any changes, for adoption at the January 16, 2003 meeting. Specifically, staff recommends including the language in both Decisions 1 and 2.